that it had "virtually abandoned the *Joy Silk* doctrine altogether," as noted in this Court's opinion herein.

The Board's alleged new doctrine, the merits of which the *amicus* and other parties have not been afforded the opportunity to brief and fully argue, raises new and serious issues which require resolution by this Court. For example, is the "key to the issuance of a bargaining order . . . the commission of *serious* unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election"? (37 L.W. 4536 at 4540-1; emphasis supplied) Or is it, conversely, as stated by this Court in the very next sentence of its Decision, *any* employer "misconduct"? (37 L.W. 4536 at 4541) The results in a particular case, of course, may vary significantly if one, rather than the other, of these criteria constitutes the controlling law. Without a clear resolution by this Court the preciseness and predictability so necessary in this significant area of the law will still only be a mirage and parties to Board proceedings will once again be left to the shifting and conflicting opinions of the Board and the lower courts.

Similarly, this Court's Decision is subject to a variety of different, and even conflicting, interpretations which obfuscate, rather than clarify, the guidelines by which it may be determined when an employer's refusal to bargain, accompanied by interference with the election processes, warrants issuance of a card-based bargaining order. It may thus be legitimately argued that any one of the following standards was that actually intended by this Court:

(1) That a bargaining order is warranted, as urged by the Board in its new position, where the

employer commits "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election" (37 L.W. 4536 at 4540-1);

(2) That a bargaining order is warranted, as this Court stated in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956) and reasserted in the Decision, where there is an "absence of any bona fide dispute as to the existence of the required majority of eligible employees" (37 L.W. 4536 at 4542);

(3) That a bargaining order is warranted, as this Court indicated in delineating the boundaries of its Decision, where, although *no* unfair labor practices may have been committed, the employer's conduct was nevertheless sufficient to demonstrate that "a fair election could probably not have been held, or where an election that was held was in fact set aside" (37 L.W. 4536 at 4543, fn. 18);

(4) That a bargaining order is warranted, as this Court noted in describing the issues involved herein, where the employer "has committed independent unfair labor practices which have made the holding of a fair election unlikely *or* which have in fact undermined a union's majority and caused an election to be set aside" (37 L.W. 4536 at 4545; emphasis supplied);

(5) That a bargaining order is warranted, as this Court observed in indicating when a cease-and-desist order may not be an appropriate remedy, where the employer has succeeded by his misconduct "in undermining a union's strength and destroying the laboratory conditions necessary for a fair election" (37 L.W. 4536 at 4546); or

(6) That a bargaining order is warranted, as the Court stated in its summation of its present holding, where "the Board finds that the possi-

> bility of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (37 L.W. 4536 at 4547).

The different results which would flow from one, rather than the other, of the above standards require, it is submitted, clarification by this Court.[6]

The Court's approval of authorization cards as a predicate for a bargaining order underscores the importance of the criteria by which the Board adjudicates the validity of such cards. The Board's *Cumberland* rule fails to establish adequately such criteria and the Decision on this issue, as the result in part of insufficient argument by parties who did not believe that this question was before the Court, also fails to establish such guidelines. What, for example, would constitute "an approach any more rigid than that in *General Steel*" or a "too easy mechanical application of the *Cumberland* rule"? (37 L.W. 4536 at 4545) These critical questions should not be left to future litigation and the potential of conflict such as that which presently exists between the Board and numerous appellate courts. If authorization cards are in fact to be a basis for bargaining orders then, surely, it should be clearly specified as to those conditions which are requisite to their validity.

It is respectfully submitted that the failure of this Court to prescribe standards will permit the Board to

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[6] See, e.g., the Court's utilization of, and reliance on, appropriate standards in the application of another provision of the Act in *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), where the Court articulated specific guidelines for determining the legality of reserved gate picketing under Section 8(b) 4(A) of the Act.

revert to its prior policy simply by changing labels. As an example, in *Nat Harrison Associates, Inc.*, 177 NLRB No. 24, (printed as Appendix B hereto) made public July 2, 1969, the Trial Examiner ordered card-based bargaining upon the employer's lack of "good-faith doubt." The Board in its decision, rather than sending the case back to the Trial Examiner for new findings consistent with this Court's decision, adopted pro forma the findings, conclusions and recommendations of the Trial Examiner and then simply dropped a footnote which rephrased the Trial Examiner's language to comport with the Court's decision herein and assumed findings neither considered nor found by the trial examiner.

CONCLUSION

For the foregoing reasons, the Federation respectfully requests that the Petition for Rehearing of General Steel Products, Inc. and Crown Flex of North Carolina, Inc. be granted.

Respectfully submitted,

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In

APPENDIX A

FOR RELEASE AFTERNOON PAPERS
JUNE 12, 1962

176 NLRB No. 91

D-7000
Zanesville, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 8-CA-5100, 8-CA-5103

Chas. Levy Beverages, Inc.

and

International Molders & Allied Workers Union, AFL-CIO

APPENDIX

Decision and Order

On February 16, 1962, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

APPENDIX

APPENDIX A

FOR RELEASE AFTERNOON PAPERS
JUNE 19, 1969

176 NLRB No. 91

D-2000
Zanesville, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 8-CA-5100, 8-CA-5108

CLAY CITY BEVERAGES, INC.

and

INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO

Decision and Order

On February 10, 1969, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

The Facts

The Respondent operates a small plant in Zanesville, Ohio, where it bottles soft drinks for wholesale distribution throughout the immediate area. The majority of the stock of the Respondent is owned by Okey Johnson, but the actual operation of the plant and the distribution of its products is controlled by his sons, Richard and Bradley Johnson. The Respondent normally employs approximately 12 employees in its production operations, exclusive of supervisors, clerical employees and salesmen.[1]

In the middle of July 1968, following some talk concerning unionization among the Respondent's employees, Lloyd Paxton, a filler operator, obtained authorization cards from a representative of the Union. On the evening of July 19, 1968, 10 of the employees met in a vacant yard, and after some discussion Paxton distributed the authorization cards. All 10 of the employees signed the cards and returned them to Paxton, who in turn delivered the cards to a representative of the Union. On July 23, 1968, Paxton was discharged and on the following day the Union unsuccessfully requested recognition and bargaining with the Respondent on the basis of its status as the majority representative of the employees in an appropriate unit. On July 25, 1968, because of the discharge of Paxton and the Respondent's refusal to recognize and bargain with the Union, the employees went out on a strike, which continued until September 23, 1968.

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[1] We agree with the Trial Examiner's finding that the unit stipulated to by the parties, consisting of all production and maintenance employees employed at the Respondent's plant at Zanesville, Ohio, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, is a unit appropriate for the purposes of collective bargaining.

The 8(a)(1) Conduct

We agree with the Trial Examiner's findings that the Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Roy Agin, and by the letter it directed to its employees engaged in an unfair labor practice strike threatening them with discharge unless they abandoned their strike and returned to work by August 5, 1968. As to the latter violation, the Trial Examiner inadvertently failed to make a conclusion of law, and we shall, accordingly, modify his Conclusions of Law and Recommended Order to this extent. We similarly find, in agreement with the Trial Examiner, that an additional violation of Section 8(a)(1) ensued from the remarks made by Okey Johnson to Union Organizer Kisner on August 14, 1968, to the effect that the strikers would be reinstated only if the Union abandoned its demand for recognition and bargaining, and that Paxton would not be reinstated at all because he was the "instigator" of the Union and the strike. At the time Okey Johnson made these remarks, the Respondent had already threatened the employees with discharge for failure to abandon the strike, and conditioning their right to further employment upon a total renunciation of their union activities and desires for collective bargaining constituted a further act of interference, restraint, and coercion.

For the reasons set forth herein, we also adopt the Trial Examiner's finding that the Respondent violated Section 8(a)(1) by failing to pay to the employees who participated in the strike the $10 bonus it paid to the employees who remained at work. Considering the evidence in the posture most favorable to the Respondent's contention that it had promised the employees a $10 bonus when production reached 4,000 cases a day, and that this production figure was reached on July 24, 1969, we find that the strikers were employed and working on the day the bonus was earned and accrued. Accordingly, the Respondent's payment of the bonus only to those who desisted from strike activity violated the Act.

The 8(a)(3) Conduct

Contrary to the contention of the Respondent, we find that the record adequately supports the Trial Examiner's findings that the Respondent was fully aware of the union activities of Lloyd Paxton and the extent of his participation in the organizing campaign, and that Paxton's union activities were the motivating and immediate cause for his discharge. During the course of the unlawful interrogation of Roy Agin by the Johnson brothers on the evening of July 22, 1968, Agin identified Paxton as the employee who had the authorization cards, and he also informed the Johnson brothers that all the employees had signed cards. When Paxton appeared at work on the following morning he was immediately called to the office and summarily discharged. At the meeting of August 14, 1968, Union organizer Kisner renewed the Union's request for recognition and bargaining, and he also requested that the Respondent reinstates Paxton. In response to the latter request Okey Johnson replied that the Respondent would never take Paxton back because he was the "instigator" of the Union and the strike, and Paxton was responsible for destroying a valuable piece of property.

The Respondent contends that Okey Johnson's reference to the destruction of property supports its contention that Paxton was discharged for unsatisfactory operation of the bottling machine. We agree with the Trial Examiner that there is no merit to this contention. Moreover, assuming that Okey Johnson's refusal to reinstate Paxton was based in part on grounds of his alleged unsatisfactory performance on the bottling machine, this fact would not justify a finding that his discharge was not unlawful where as here the discharge was motivated at least in substantial part by his union activities.[2]

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[2] *N.L.R.B.* v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352 (C.A. 2), enfg. 133 NLRB 911, cert. denied 373 U.S. 950.

The 8(a)(5) Conduct

We find, in accord with the Trial Examiner, that when the Union demanded recognition and bargaining on July 24, 1968, it represented an uncoerced majority of the employees in the stipulated appropriate unit, and that the Respondent's rejection of the demand was motivated, not by a good-faith doubt of the Union's majority, but by a rejection of the collective-bargaining principle and a desire to gain time to undermine the Union's majority.[3] The Respondent contends, nevertheless, that it was not obligated to recognize or bargain with the Union because Richard Sanders, who it contends is a supervisor, participated in the Union's organizing campaign.

Contrary to the Trial Examiner, we find that Sanders' change from a salaried to an hourly-paid position at or about the time Fred Tahyi was hired in February 1968, did not, without more, deprive him of his supervisory responsibilities and authority. Sanders testified, without contradiction, that his duties and responsibilities after his change to hourly-paid status were "about the same", and that he "still had the right to hire and fire and was over the boys." Every other witness who testified at the hearing, including the employees, stated that at all times Sanders had authority both to hire or fire and authority to direct the work of the employees. We find, accordingly, that Sanders was a supervisor at all times material to this case, and we shall exclude him from the bargaining unit.

Having found Sanders to be a supervisor, it does not necessarily follow, however, that his signing of an authorization card and limited participation in the organizing campaign is sufficient to taint the authorizations signed by the employees. The organizing campaign was of extremely limited duration, having begun in mid-July and

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[3] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914.

culminating on July 19, 1968, when 10 employees attended a meeting in a vacant lot. Sanders engaged in some lunch-time conversations with employees about the Union. He attended the July 19 meeting, signed a card, and considering the evidence in the light most favorable to the Respondent's contention, Sanders also answered questions of an unspecified nature while present at the meeting. Nevertheless, Paxton obtained the cards from the Union, and he alone solicited the signatures. The authorization cards were returned to Paxton, and he made them available to the Union. In addition, Sanders was a low-level supervisor, and testimony indicated that the Respondent was in no way chargeable with Sanders participating in the campaign. Under these circumstances, and particularly as the record fails to show the nature of Sanders' statements during the lunch-time conversations and at the July 19 meeting, we find that Sanders' participation in the organizing campaign di not taint the cards of the employees,[4] and since the invalidation of his card alone does not reduce the number of valid cards below a majority, we shall adopt the Trial Examiner's findings and Recommended Order with respect to the refusal to bargain.

Amended Conclusions of Law

The following is substituted for the Trial Examiner's fourth Conclusion of Law:

4. By interrogating its employees regarding their union membership and activity, by refusing to pay to strikers the same $10 bonus for prestrike production achievement that was paid to nonstrikers, as an economic reprisal for engaging in a strike, and by threatening its employees engaged in an unfair labor practice strike with discharge in a letter dated August 2, 1968, the Respondent has engaged in interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

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[4] *Aero Corp.* v. *N.L.R.B.*, 149 NLRB 1283, enfd. 363 F. 2d 702, cert. denied 385 U.S. 973.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Clay City Beverages, Inc., Zanesville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 1(c) of the Trial Examiner's Recommended Order and substitute therefor the following:

(c) Interrogating its employees with regard to their union membership and activity, threatening them with discharge unless they abandon protection activities, conditioning their reinstatement upon abandonment of protected activities, and refusing to pay a bonus to employees because they engaged in protected activities.

2. Add the following as paragraph 1(d) of the Trial Examiner's Recommended Order:

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

3. Add the following as paragraph 2(b), and reletter the following paragraphs accordingly:

(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

4. Add the following as paragraph 3:

3. All allegations in the complaint not specifically found herein are hereby dismissed.

5. Delete the fourth indented paragraph of the Appendix and substitute therefor the following:

> WE WILL NOT interrogate our employees with regard to their union membership and activity, threaten them with discharge unless they abandon protected activities, condition their reinstatement upon abandonment of protected activities, refuse to pay them a bonus because they engaged in protected activities, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, to bargain collectively through a representative of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of the Act, as amended.

6. Add the following as the last indented paragraph of the Appendix:

> WE WILL notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

(SEAL) *National Labor Relations Board*

TXD—26—69
Zanesville, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases 8-CA-5100, 8-CA-5108

CLAY CITY BEVERAGES, INC.

and

INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO

Charles Z. Adamson, Esq., for the General Counsel.

Charles D. Minor, George L. Jenkins, and *Jon M. Cassady, Esqs.*, of Columbus, Ohio, and Zanesville, Ohio, respectively, for the Respondent.

Mr. Clayton E. Kisner, of Marion, Ohio, for the Union.

Trial Examiner's Decision

Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon a charge in Case 8-CA-5100 duly filed on July 29, 1968, and a charge in Case 8-CA-5108 duly filed on August 2, 1968, and thereafter amended on August 21, 1968, by International Molders & Allied Workers Union, AFL-CIO, hereinafter called the Union or Charging Party, the General Counsel of the National Labor Relations Board, hereinafter referred to as the General Counsel[1] and the Board, respectively, by the Regional Director for Region 8, Cleveland, Ohio, issued its consolidated complaint dated September 20, 1968, against Clay City Beverages, Inc., hereinafter referred to as the Respondent.

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing thereon was held before me in Zanesville, Ohio, on November 13, 1968. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing, oral argument was waived. Briefs were received from Respondent and from General Counsel on December 23, 1968.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

The complaint alleged, the answer admitted, and I find that: Clay City Beverages, Inc., is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Ohio, engaged in bottling and wholesale distribution of soft drinks at its Zanesville, Ohio, location. Annually, in the course and conduct of its business, Respondent receives at its place of business in Zanesville, Ohio, goods valued in excess of $50,000 directly from points located outside the State of Ohio.

Accordingly, I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Union Involved

International Molders & Allied Workers Union, AFL-CIO, is a labor organization admitting to membership employees of Respondent.

III. The Unfair Labor Practices

A. *The Facts*

From the point of view of the employees this case begins about the middle of July 1968. From the point of view of Respondent the case supposedly begins before Thanksgiving 1967.

For some years Respondent's bottling works in Zanesville, Ohio, had been owned and operated by Okey Johnson (Okey) as Chairman of the Board and his sons, Richard Johnson (Richard) as president and general manager, and Bradley Johnson (Brad) as secretary and plant manager. According to the testimony of Richard, Okey held the controlling financial interest in the business of Respondent but had not participated in the management of the business for some years prior to the events here because of a problem with alcohol although he remained as Chairman of the Board of Respondent. Okey was not called as a witness here.

Exclusive of the Johnsons, Respondent's plant was operated by 11 production and maintenance employees and 1 transport driver. In accordance with the stipulation of the parties I find that these 11 production and maintenance employees and 1 transport driver constitute the appropriate unit herein.

Prior to some indefinite date in May 1968, Respondent's filler or bottling machine had been an old one of German make. As Richard Sanders, one of Respondent's senior employees in point of service and at the time of the hearing either Respondent's assistant plant manager or assistant

production manager,[2] described it, "the old machine was kind of hard to run anyway. It was not the best." Fred Tahyi, temporarily also a production manager, described the machine as "worn out." The infirmities of the machine were those not unknown to numerous bottling companies: partly filled bottles, caps askew, foreign objects in the bottle contents, and not infrequent machine breakdowns.

About Thanksgiving time in 1967 Brad Johnson took the problems to the manufacturer of the machine who, not unnaturally, assured Brad that the trouble was with the operator and not the machine. Despite this assurance, however, the manufacturer rebuilt the feeder head of the machine twice thereafter in the year 1967. Finally about February 1968 Respondent decided to replace that machine with a newly rebuilt one. The date the newly rebuilt machine actually replaced the old one was left highly indefinite in this record although the evidence indicates that it must have been sometime during the month of May 1968. Between February 1967 and July 23, 1968, Lloyd Paxton was the bottling machine operator following his promotion from the position of a transport driver.

In the latter part of February 1968, one Fred Tahyi sold the beverage business he conducted in Coshocton, Ohio, to Respondent and accepted a job thereafter with Respondent which, according to Tahyi and Johnson, was supposed to be that of production manager. Tahyi apparently replaced Richard Sanders as such assistant production manager, a salaried position which Sanders had been filling prior to the hiring of Tahyi. At or about the time of Tahyi's employment Sanders suddenly lost his salaried position and became an hourly paid employee. During this period Sanders was ordered to show Tahyi how to run Respondent's machinery. However about the end of April and

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[2] The Johnsons and Sanders used both titles indiscriminately to describe both the job Sanders held prior to April 1968 as well as the "new" job he received on July 23, 1968.

before the arrival of the new bottling machine Tahyi left Respondent's employ. Sanders remained a rank-and-file hourly paid employee until he was offered a "new" position of assistant plant manager or assistant production manager on a salary basis on the evening of July 22, 1968.

About the middle of July, following some talk of unionization among the employees, Lloyd Paxton secured some union authorization cards from a local union official employed in a nearby plant.

After work on Friday, July 19, through notice by word of mouth in the plant, 10 of Respondent's production and maintenance employees, including Richard Sanders, gathered at a vacant lot located at Fifth Street and Howard Avenue in Zanesville, 1½ blocks from Respondent's plant, where Paxton passed out the union authorization cards to the employees and with the help of Richard Sanders explained what they were. All 10 of the employees present signed and witnessed this signing of these unambiguous union authorization cards. Those employees attending and signing such authorization cards were employees Roy Agin, David Bonfield, James Dobbins, Terry Dobbins, Homer Keiffer, Dennis Moorehead, Lloyd Paxton, Richard Sanders, Robert Seenes, and David Vandenbark. The cards so executed were given to Paxton who thereafter delivered the signed cards to his friend, the union official.

As employee Roy Agin was about to get into his automobile parked across the street from the plant after work on the evening of Monday, July 22, Richard and Brad Johnson called him back across the street in front of the plant and asked him what he knew about the Union. At first Agin denied knowing anything about the Union. Richard then stated that he knew the employees "were trying to get a union in" and wanted "to know who all were involved in it." He also stated that a union would cause nothing but trouble in the plant. Agin then told the Johnsons that Lloyd Paxton was "the one that had the cards" and that

all the employees had signed them. Richard assured Agin that he, Richard, "would not say anything to anybody that he had had that conversation" with Agin and Agin agreed to say nothing about it either. The conversation ended on this note.

Later that same evening of Monday, July 22, the Johnsons telephone Richard Sanders at Sanders' home while he was bathing after work and asked him to return to the plant in order that they might talk to Sanders about "moving up a step." When Sanders returned to the plant Richard asked Sanders how Sanders "would like to become . . . Brad's assistant production manager" on a stated salary because they thought Sanders would be "the best" for the job with his knowledge of plant operations due to his long tenure in the plant. Sanders said that he would discuss the salary with his wife and would let the Johnsons know the next morning. During this discussion the Johnsons expressed the opinion that Lloyd Paxton "was not doing the job he should be doing" and that they thought they were going to let Paxton go. With that Sanders left the plant.

On July 23 when Paxton appeared for work as usual, Brad took him into the office and told him in front of Richard that "the bottles were going down the line with crowns not on properly; they were not properly capped; [Paxton] had been sitting around too much and [his] services were no longer needed." Brad then handed him a check for 45 hours' work so that Paxton could look for another job. He has not been reinstated since.

On July 24 Union Organizer Clayton E. Kisner appeared in Zanesville in response to a telephone call from Paxton notifying him of the signed authorization cards and his own discharge. At noon he and Paxton met the employees at lunch across the street from the plant.[3] Although the em-

[3] Sanders was not present at this or any other subsequent meeting of the employees.

ployees talked in favor of immediate strike because of the discharge of Paxton, Kisner requested time for him to talk to the Johnsons about recognition and reinstatement before any action was taken.

Although he was then in the immediate vicinity of the plant, Kisner chose to telephone Richard Johnson. Over the phone Kisner asked for recognition as he had signed union authorization cards for "a majority (10 out of 12) of the twelve employees" in the stipulated appropriate unit. After some talk as to how this majority could be verified, Richard said that he could do nothing because his lawyer was out of town.

That evening following this telephone call, Kisner and Paxton again met with eight employees at Putman Hill Park where Kisner reported to them his lack of success with Richard. The employees present decided to strike the plant the next morning.[4]

At 7 a.m. on July 25 employees Agin, Vandenbark, Bonifield, Terry Dobbins, and Jim Dobbins went out on strike and with Paxton began picketing the plant. The other employees returned to work apparently being bothered by the financial loss to them in engaging in such a strike.

On July 26, having been unable to reach Richard by telephone, Kisner telephoned Okey Johnson. Again Kisner explained that he represented a majority of the employees and requested recognition by Respondent and reinstatement of Paxton. Okey answered that he and "the boys" (Richard and Brad) would have a meeting the next Monday and would talk the matter over with Respondent's attorney who was in charge of the matter. That concluded the telephone call.

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[4] The employees present were Terry Dobbins, Dave Vandenbark, Paxton, James Dobbins, Robert Seenes, Homer Keiffer, Roy Agin, and David Bonifield.

Also on July 26, 1968, Respondent rewarded each of the employees then working in the plant with a $10 bonus.

On Monday evening, July 29, Kisner telephoned Richard at his home and asked him if Respondent had come to any decision on recognition and reinstatement. Richard indignantly refused to discuss business from his home, telling Kisner that he would only conduct business in his office, and hung up the telephone.

On August 1 Richard saw Agin, Vandenbark, Terry Dobbins, and Bonifield still on the picket line and invited them to return to work. They refused. On Friday, August 2, Respondent wrote each of them the following letter:

> We are asking you to return to your job Monday, August 5, 1968, at 7:00 A.M. This is the last date your job will be held for you.
>
> This renews our request of last Friday to return to work.
>
> If you fail to report for work on Monday morning, we will consider your employment terminated and all connection with our company ended.

None of the four remaining pickets returned to work.

Then on August 14 Kisner, through the intervention of one Cecil C. Fulton, a good friend of Okey's and a former retired official of the local union, met with Fulton and Okey in the plant office. Upon being asked for recognition and for the reinstatement of Paxton, Okey stated that Respondent would take the four remaining strikers back to work provided that Kisner forget the whole thing and went back to his base at Marion, Ohio. Kisner refused that offer. Okey also stated that Respondent would never take Paxton back even if they had to go to the highest court possible on the grounds that he was "the instigator" of the Union and of the strike and was responsible for destroying a very valuable piece of property.

Richard saw Okey driving himself to and from this meeting in his automobile. Both he and Brad knew that Okey was meeting with Kisner, the union organizer, in Respondent's office but, as Richard testified, " . . . I stayed out of the office especially." There is undenied testimony that Richard and Brad were invited to participate in the meeting but refused.

Under date of September 18, 1968, Respondent sent each of the four remaining pickets the following letter:

> We are asking you to return to your job Monday, September 23, 1968, at 7:00 A.M. *This offer is unconditional.*
>
> The company has continued to carry on your insurance program in your absence. You have lost no other benefits which you has acquired during the course of your employment with us.
>
> It is our sincere hope that you will accept this offer.

In response all four of these employees returned to work. Subsequently two of them voluntarily left Respondent's employ.

B. *Conclusions*

1. Discharge of Paxton

From February 1967 to July 23, 1968 Lloyd Paxton operated Respondent's bottling machine following his promotion from his former transport driver position. The Johnsons admit that his services on the filling machine for the first half of that period had been satisfactory. Moreover neither Johnson could recall ever having criticized his work to Paxton during that whole period.

Then on July 19, a Friday, by word of mouth Paxton gathered 9 of the other 11 production and maintenance employees in an open field 1½ blocks from the plant, explained

the Union and its authorization cards to the assembled employees, and succeeded in having all of them execute unambiguous cards authorizing the Union to bargain on their behalf. Richard Sanders was one of the employees executing such authorization cards at this meeting.

On Monday evening, July 22, employee Roy Agin testifield that Richard and Brad asked him about the Union and who were involved and that he informed them that Paxton had brought the union cards and had signed up all the employees. Both Agin and Richard agreed that the conversation would be kept secret.[5] The next morning, July 23, Paxton was precipitously discharged allegedly for poor workmanship.

Subsequently on August 14, Okey Johnson, Respondent's Chairman of the Board, rather vehemently refused the Union's request for the reinstatement of Paxton on the grounds that he was "the instigator" of the Union and of the strike and the destroyer of valuable property.[6]

With the above evidence General Counsel has proved a strong *prima facie* case of a typical type of discriminatory discharge. The weak spot in the case, if any, appears to be the question of Respondent's knowledge of Paxton's union activity prior to his discharge. This, of course, is amply supplied by the Agin-Richard and Bradley conversation on the evening of July 22 to the effect that Paxton was the instigator of the union effort and the strike and by the admission on August 14 that Paxton had been fired because he was such instigator. The trouble, if any, as to these pieces of evidence arises because both Richard and Bradley denied flatly that they had had any conversation on July

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[5] Both Johnsons subsequently flatly denied that any such conversation occurred.

[6] This last must have been a reference to Respondent's business because there is no evidence in this record to the effect that Paxton destroyed or injured any machinery.

22 with Agin and also claimed that Okey was a chronic alcoholic and on August 14 was "completely inebriated". This testimony naturally creates a credibility question as to both the above pieces of evidence.

In addition to the credibility problems thus raised, Respondent in its brief argues that the refusal-to-bargain allegations must be dismissed with the following argument:

> It is submitted, however, that whether or not the company had a good faith doubt as to the Union's majority status, there is no violation of Section 8(a)(5) of the Act for another reason. Due to the active participation and leadership of Richard Sanders in its organization campaign, the Union, on July 24, did not represent a majority of the employees within the bargaining unit. As is stated in *ATI Warehouse,* 169 NLRB No. 75, 67 LRRM 1256 (1968):
>
> > It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid for such purposes. (For the purpose of a bargaining request.)

However, if this argument be sound, the problem of Respondent's knowledge of Paxton's union activities is likewise solved because, as a supervisor, Sanders' admitted knowledge of Paxton's union activities would be imputed to Respondent as a supervisor's knowledge is that of the employer.

Despite the brief's claim "there is no question as to Richard Sanders' supervisory position," the only trouble with this theory of imputed knowledge is that the above fact so stated by Respondent is incorrect in that for several months prior to receiving his "step up" to assistant plant or assistant production manager on July 23, Sanders had been reduced to the status of an ordinary hourly paid employee without supervisory authority which during his

employment by Respondent had passed to Fred Tahyi. In fact it was this reduction to an hourly paid status which caused Sanders to become interested in the Union. As such ordinary rank-and-file employee the Act guaranteed Sanders the right to engage in union activities as of that time.

However, Sanders testified that he never told the Johnsons of this union organizational activity because, as he put it, "I wasn't going to tell Richard or Brad because I figured they would find out for themselves and all in due time." Regardless of the fact that Sanders testified that he had never informed the Johnsons of his attendance at the July 19 meeting until the very day Respondent called him as a witness at the hearing, I find no reason to disbelieve Sanders on that point although doubting the last part of his testimony.

Sanders' testimony, however, strongly suggests that due to the smallness of the plant with only 12 production and maintenance employees the Johnsons were bound to learn quickly of any and all union activities therein. I must agree. In a plant of this size it is, of course, possible, but highly improbable, that Respondent would not become aware almost immediately of the existence of union activity therein. Miracles do happen—but infrequently.

Leaving for the moment this disputed question of knowledge, the Johnsons also contended that for the last half of his tenure on the bottling machine, the complaints of Paxton's work "increased progressively" so that as early as November 1967, Richard and Brad began serious consideration of dismissing Paxton for poor workmanship.

According to both the Johnsons, they became convinced that the troubles in bottling were those of Paxton and not those of the old German machine when its manufacturer, without having seen the machine, so informed them. Despite this alleged conviction that the trouble was Paxton's, the facts disclose that thereafter the machine manufacturer rebuilt the feeder head on the machine—not one but indeed

twice—and still the trouble continued. Thus the facts justify Tahyi's appraisal that the machine was "worn out" and Sanders' that the machine "was not the best." In fact the Johnsons themselves decided in February a new machine was necessary. This history is quite sufficient proof that the problem Respondent here attempts to blame upon Paxton was that of the machine and not of the operator.

The Johnsons' contention that the volume of complaints "increased progressively" right up to the end of Paxton's employment is at odds with the testimony of Respondent's own sales manager, Richard Glaub, who testified that "normal complaints" continued throughout Paxton's employment but that he knew of "no increase" therein. It is noteworthy that Glaub was not asked and therefore did not testify about the sale meeting supposedly held on July 22 where the increase in the complaints, according to the Johnsons, finally caused them to decide to discharge Paxton. If anyone would know of complaints about the merchandise sold, it would be the sales manager.

Because of the disparity between the testimony of Glaub and the Johnsons, I have grave doubts that the sales meeting of July 22 ever took place and that the complaints "progressively increased."

The Johnsons further testified that they began searching for an experienced operator of bottling machines to replace Paxton as early as November 1967. This search was finally consummated on July 29, 1 week after Paxton had been discharged, when Respondent hired a returned serviceman with absolutely no experience on a bottling machine, although the Johnsons testified that such experience was a necessity.

Respondent attempts to explain its delay in hiring a replacement for the allegedly inefficient Paxton on the fortuitous fact that in February 1968, it bought out Tahyi's

bottling business in Coshocton and employed Tahyi with alleged plans to make Tahyi assistant production manager replacing Sanders who in turn would replace Paxton. Tahyi, in effect, collaborated this testimony by the Johnsons albeit, in this Trial Examiner's opinion, with some embarrassment.

Be that as it may, this so-called plan was never implemented beyond the fact that Sanders was promptly reduced to a rank-and-file hourly employee upon the employment of Tahyi. Paxton continued to be the bottling machine operator without change despite the employment of Tahyi. No one except the Johnsons and, perhaps, Tahyi ever heard of this alleged plan. Its implementation was nil. As a matter of fact neither Johnson could recall an instance where Paxton's work during this whole period had ever been criticized to Paxton himself. Thus it seems that Paxton continued to operate even the newly installed machine without criticism from the Johnson at least until the evening of July 22.

The Johnsons maintained that Respondent had "hired" Patric McDaniel, the returned serviceman, who ultimately replaced Paxton as bottling machine operator, before it discharged Paxton. This contention is contrary to the testimony of McDaniel. McDaniel's testimony proved that sometime early in July he had, by chance, run into Brad in the vicinity of their respective homes and that Brad had suggested that Respondent might have employment for him if he were interested. At that time McDaniel was not interested because he had just been released from service and preferred to "free lance." McDaniel, in fact, continued to vacation until July 26 when he went to an employment agency where he found only two possible jobs listed, one of which was the job with Respondent. On that same day McDaniel went to the Respondent's plant, asked Brad for the job, and got it. But Paxton had been discharged at least 3 days before. Thus Respondent's alleged long

search for a filling machine operator begun in November 1967 ended. This long "search" has all the appearance of being the figment of someone's imagination.

According to Brad, "one of the main things [causing the decision to discharge Paxton] was that a sales meeting is held at the plant every Monday morning. There were so many complaints at that time [July 22]" that the Johnsons determined to discharge Paxton. Brad testified that the final decision to discharge Paxton was made between 7:30 and 8 a.m. July 22. On this Richard disagreed testifying that the decision was made, after a day long discussion, during the evening of July 22. The importance of the July 22 sales meeting in the making of the decision is greatly diminished by Brad's other testimony that he had begun looking for a replacement as early as November 1967, by his claim that he had hired McDaniel on July 19, and by Glaub's testimony. The promotion of Sanders during the evening of July 22 tends to confirm Richard's testimony that the decision on Paxton also occurred during that same personnel meeting. Of course, if Richard is correct in this as it seems he was, the decision to discharge Paxton occurred after the Johnsons' conversation with Agin.

In any event it is clear that the decision to discharge Paxton was a precipitous, hurried, and on-the-spur-of-the-moment decision for the reason that it was made without there being a replacement in sight. There seems no question but that the decision was made on the spur of the moment and as a result of some momentous event such as the discovery that Paxton was the instigator of the Union.

Richard also maintained that Zanesville suffered a very severe storm on July 22 which caused the loss of three trees on the theory, apparently, that an outside conversation such as Agin described would be impossible in such weather. Strangely only Richard mentioned this storm. Richard further testified that on July 22 he made two trips to Newark, Ohio, but even the times he gave in regard to these trips would have gotten him back to Zanesville in time

to hold the Agin conversation at the time Agin said it happened.

In sum, the above has caused this Trial Examiner to view the testimony of both Johnsons with skepticism. Accordingly, as Agin gave all appearances of a witness telling the truth, I credit his testimony that the Johnsons asked him about 4-4:30 p.m. on July 22 what he knew about the Union and were told that Paxton had obtained the union authorization cards and gotten all the employees to sign them. I, therefore, discredit the Johnsons' flat denials thereof.

In the light of the Johnsons' subsequent treatment of the Union's request for recognition, the Agin conversation was just such an event as would have triggered the sudden discharge of Paxton.

Richard and Brad attempted to discredit Okey's admission that Paxton was discharged by Respondent because he was the "instigator" of the Union and of the strike by testimony, no doubt true, that Okey was an admitted alcoholic and that on August 14 was "completely inebriated." If this last were true, then Richard's action in permitting Okey to drive his Cadillac in that known condition away from the plant, at least, verged upon actionable negligence. However the fact remains that even inebriates can and do tell the truth. On this occasion this Trial Examiner is convinced that on August 14 Okey was in fact telling the truth.

Under all the facts here this Trial Examiner is convinced, and therefore finds, that Respondent discharged Lloyd Paxton because of his known membership in and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

2. Interference, restraint, and coercion

There is no question but the action of Okey Johnson on August 14 in conditioning the reinstatement of the employees still engaging in an unfair labor practice strike

against Respondent caused by Respondent's unfair labor practices and in discriminating against Lloyd Paxton because of his union activities upon the agreement of the union representative to return to his base in Marion, Ohio, and "forgetting the whole thing" amounted to interference with, and restraint and coercion of Respondent's employees in violation of Section 8(a)(1) of the Act. The Trial Examiner so finds.

Nor can there be any doubt but that Respondent's letter to the strikers dated August 2, 1968, threatening, as it did, the strikers with loss of employment unless they abandoned their unfair labor practice strike by the following Monday also constituted a violation of Section 8(a)(1) of the Act. The Trial Examiner so finds.

It was stipulated that on July 26, 1968, the day after the strike began, Respondent paid each of its employees then working in the plant after having crossed the picket line the sum of $10.

Respondent maintained that at some indefinite date in the past Brade had promised the employees a $10 bonus whenever production reached 4,000 cases cases per day and that on July 24 production did in fact reach 4,000 cases for the first and only time in Respondent's history. As Respondent was working shorthanded on July 24, following the discharge of Paxton, it is somewhat hard to believe that this absolutely unique production record was set that day. It is also hard to believe that such a record was not memorialized in Respondent's business records and that such records would not be produced at the hearing to corroborate the oral testimony of the Johnsons. No corroboration of this type was offered. I am inclined to believe that the $10 paid was paid by Respondent as a bonus to those employees who were working behind the picket line. If in fact a record was established by the production of July 24, then by failing to pay that same bonus to employees, then on the picket line but who had participated in the

setting of that record, Respondent obviously engaged in economic reprisals against them because of their engaging in the strike. In either event Respondent's action amounted to interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

In order, therefore, to restore the status quo this Trial Examiner is going to order Respondent to pay the employees on the picket line on July 25 who had worked in the plant when the alleged production record was set on July 24 the sum of $10 each.

3. The refusal to bargain

a. *Appropriate unit and majority*

The parties stipulated that the unit appropriate for the purposes of collective bargaining at Respondent's plant consisted of the following:

> All production and maintenance employees employed at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The parties agreed also that there were 12 production and maintenance employees employed in the above-found appropriate unit.[7]

On July 19, 10 of Respondent's employees in the appropriate unit, at that time including Richard Sanders, voluntarily signed authorization cards reading in full as follows:

> I hereby authorize the INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, A.F.L. - C.I.O. to represent me and, in my behalf, to negotiate all agreements or contracts in regard to wages, hours and working conditions.

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[7] The parties did disagree as to the inclusion of an employee named Fox in that appropriate unit. Under the facts of this case it is immaterial whether or not Fox was or was not included therein.

Consequently at the time the Union made its request of Respondent for recognition on July 24, the Union represented a large majority of all Respondent's employees in the appropriate unit. The inclusion of employee Fox and the subsequent exclusion of Richard Sanders do not affect the Union's majority status at any time.

Consequently on July 19, 1968, and at all times thereafter, the Union was the duly authorized bargaining agent of a majority of the Respondent's employees in the stipulated appropriate unit and entitled to recognition and the right to bargain with Respondent on behalf of the employees in that unit.

b. *The refusal*

Respondent's refusal to bargain with the Union is crystal clear. Respondent never intended to bargain and succeeded in not doing so through its own deliberate actions. When first asked to grant recognition, Respondent through Richard stalled on the ground that Respondent's attorney was out of town. Once having used this excuse, it became incumbent upon Respondent to make up its mind and notify the Union of its decision. This Respondent did not do. Respondent stalled again when Okey told Kisner that Respondent was having a meeting the following Monday when it would consult with its attorney and make up its mind. Again it became incumbent upon Respondent to notify the Union of its decision, if any. Again Respondent refused to do so. Then Kisner telephoned Richard at home in the evening to find out what decision, if any, Respondent had reached at that alleged Monday meeting. This time Richard arrogantly refused to discuss Respondent's business at his home. Finally Respondent's Chairman of the Board on August 14 offered to reinstate the remaining strikers conditioned upon the Union's getting out of town and "forgetting the whole thing." These are not the actions of a party willing to engage in collective bargaining with the exclusive representative of a majority of its employees in

an appropriate unit. These actions, individually or collectively, amount to a refusal to bargain.

As for the instance of August 14 Respondent is estopped to make its usual excuse for the actions of Okey because the facts show that both Richard and Brad knew that its Chairman of the Board was engaged with the Union obviously on matters concerning collective bargaining and yet Richard, at least, "especially" stayed out of the conference, even though invited, thereby deliberately misleading the Union into believing that it was dealing with a responsible official of the Respondent. This is at least as reprehensible as Richard's permitting a "completely inebriated man," as Richard described him, to drive his automobile from the plant onto the public highways as Richard allowed him to do.

Respondent claims "a reasonable doubt" as to the Union's majority status. This contention, like the others, is mere verbiage under the facts here because Respondent was offered a full and fair opportunity to determine through the cards that status and deliberately chose not to avail itself thereof. Self-imposed deception or delusion does not amount to "a reasonable doubt." Respondent had no one but itself to blame for any doubt. Respondent attempts to profit by its own wrongdoing. Respondent had nothing concrete or tangible upon which to base a "reasonable doubt" other than its own deliberate refusal to accept a reasonable means for satisfying itself as to the Union's majority status.

Accordingly this Trial Examiner must, and hereby does, find that on July 24, 1968, and at all times thereafter, Respondent refused to bargain collectively with the Union as the exclusive representative of Respondent's employees in the above-found appropriate unit in violation of Section 8(a)(1) and (5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated in regard to the hire and tenure of employment of Lloyd Paxton by discharging him on July 23, 1968, because of his known membership and activities on behalf of the Union, I shall recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of said discrimination against him by payment to him a sum of money equal to that which he would have earned from the date of the discrimination against him to the date of his reinstatement, less his net earnings during such period, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent per annum.

Having found that $10 paid by Respondent on July 26, allegedly as a bonus for record plant production on July 24, to those employees then working behind the picket line but not paid to those employees then engaging in the strike amounted either to a benefit to those employees then at work for not engaging in the strike or else a detriment to

those then striking for engaging in said strike, I will order that Respondent pay each of the employees engaging in the strike who had worked on July 24, the day of the alleged record production, the sum of $10.

Having found that Respondent refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that, upon request, Respondent recognize and bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Because of the character and scope of the unfair labor practices found to have been engaged in by Respondent, I will recommend that Respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

Upon the foregoing findings and conclusions of law and upon the entire record, I hereby make the following:

Conclusions of Law

1. International Molders & Allied Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Lloyd Paxton by discharging him on July 23, 1968, because of his membership in and activities on behalf of the Union, Respondent has engaged in and is

engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By refusing on July 25, 1968, and at all times thereafter to bargain collectively with the Union as the exclusive representative of all Respondent's employees in the appropriate unit below, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. The appropriate is:

> All production and maintenance employees employed at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By interrogating its employees regarding their union membership and activity, by paying its employees for working behind the picket line the sum of $10 or refusing to pay strikers the same $10 as an economic reprisal for engaging in a strike, Respondent has engaged in interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that Clay City Beverages, Inc., Zanesville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating in regard to the hire or tenure of employment or of any term or condition of employment of its employees because of their membership in or activities on behalf of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization of their choice.

(b) Refusing to recognize and bargain with said Union as the exclusive representative of Respondent's employees in the above-mentioned appropriate unit.

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed the employees by the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Lloyd Paxton immediate and unconditional reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the section hereof entitled "The Remedy," with interest thereon at 6 percent per annum.

(b) Pay the sum of $10 to each of the employees who went out on strike on July 25, 1968 and who had worked in the plant on July 24 when allegedly the plant production record was set.

(c) Upon request, recognize and bargain in good faith with International Molders & Allied Workers Union, AFL-CIO, as the exclusive bargaining representative of all Respondent's employees in the above-found appropriate unit and, if agreement is reached, embody said agreement in a written signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(e) Post at its plant in Zanesville, Ohio, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[9]

IT IS FURTHER RECOMMENDED that, unless Respondent notifies said Regional Director within 20 days from the receipt hereof it will take the action here recommended, the Board issue an order directing Respondent to take the action here recommended.

Dated at Washington, D. C.

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[8] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice to All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in or activities on behalf of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, by discharging or discriminating in regard to the hire, tenure, or other terms or conditions of employment of any of our employees.

We Will offer Lloyd Paxton his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will pay him for any loss of pay he may have suffered because of our discrimination against him together with interest thereon at 6 percent per annum.

We Will pay to each of the employees on strike on July 26, 1968, who had worked in the plant on July 24, 1968, the sum of $10.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, to bargain collectively through a representative or their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a)(2) of the Act, as amended.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement executing and conforming with Section 8(a)(3) of the Act.

CLAY CITY BEVERAGES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.

APPENDIX B

FOR RELEASE MORNING PAPERS
July 2, 1969

177 NLRB No. 24

D-3010
Ft. Lauderdale, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-CA-4305 (1-2)

NAT HARRISON ASSOCIATES, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 728, AFL-CIO

Decision and Order

On March 12, 1969, Trial Examiner Richard D. Taplitz issued his Decision in the above-entitled case, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and

hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Nat Harrison Associates, Inc., Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated Washington, D. C.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We agree with the Trial Examiner that the Respondent engaged in extensive violations of the Act including wholesale unlawful interrogation, threats to discharge employees because of their union activities, promises of benefits to employees to refrain from union activity, and the discharge of two employees because they joined the Union. Moreover, as concluded by the Trial Examiner, Respondent may not destroy the very conditions needed for a fair election, as we find occurred herein, and at the same time successfully maintain that an election is the sole means for determining the desires of the employees. Accordingly, as we conclude that the Respondent's massive unfair labor practices have made the holding of a fair election unlikely, we shall provide, as did the Trial Examiner, for an 8(a)(5) bargaining order. See *N.L.R.B. v. Gissel Packing Co., Inc.*, — U.S. — (decided June 16, 1969), 71 LRRM 2481.

TXD-105-69
Ft. Lauderdale, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case 12-CA-4305 (1-2)

NAT HARRISON ASSOCIATES, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 728, AFL-CIO

Jack T. Brellis, Esq., of Miami, Fla., for the General Counsel.

Donald R. Holley, Esq., *Muller, Schenerlein & Bare*, of Miami, Fla., for the Respondent.

Willie Lee Henderson, of Ft. Lauderdale, Fla., for the Charging Party.

Trial Examiner's Decision

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Trial Examiner: This case was tried in Miami, Florida, on December 3, 4, 5, 6, and 9.[1] The issues litigated were framed by a complaint dated November 1, as amended at the hearing, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and an answer, as amended at the hearing, filed by Nat Harrison Associates, Inc., herein called Respondent, which denies that Respondent violated the Act.

[1] All dates are in 1968 unless otherwise specified.

The complaint was based on a charge in Case 12-CA-4305 dated August 9, a charge in Case 12-CA-4305-2 dated August 26, and an amended charge in Case 12-CA-4305 (1-2) dated October 23, all filed by the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, herein called the Union. All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. A brief which has been carefully considered was filed on behalf of the Respondent.

Issues

1. Whether Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their activities on behalf of the Union and by interfering with their right to engage in such activity by threatening them with reprisals if they were for the Union and promising them benefits if they were against the Union.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging James F. Aldridge and Willie L. Jeter in order to discourage membership in the Union.

3. Whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

Upon the entire record and from my observation of the demeanor of the witnesses while they were testifying under oath, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Florida corporation with its principal place of business at 5600 Northeast Fourth Avenue, Miami, Florida, is engaged in the construction business. Its primary work is electrical construction, such as the installation of electrical high lines, pipe cable, and satellite towers,

in various States of the United States and in foreign countries. This work is necessarily done at various construction sites in the field. Minor maintenance and repair of Respondent's machinery and equipment is done by mechanics in the field but for major maintenance and repair and for the dispatching of equipment to the various jobs Respondent maintains three maintenance and equipment yards. One is at Florence, New Jersey, one in Baton Rouge, Louisiana, and a third at 3615 Southwest 47th Avenue, Ft. Lauderdale, Florida. The Ft. Lauderdale yard is the situs of the alleged unfair labor practices in this proceeding.

During the 12 months immediately preceding the issuance of the complaint, Respondent purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Florida.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Alleged Violation of Section 8(a)(1) of the Act*

Facts

1. The organizational activity and Respondent's knowledge thereof

In about May Elbert A. Pirkle, a mechanic-welder in Respondent's employ, began discussing the possibility of organizing Respondent's employees with the employee of an other employer in Respondent's industry. By July 18 Elbert A. Pirkle had received from the other employee and from the Union blank application cards for membership in

the Union. On that date he passed out about 20 cards to employees of Respondent at the Ft. Lauderdale yard. Groups of cards were given to some of the employees and they in turn passed them out to other employees. On July 31 the Union held a meeting which was attended by many of Respondent's employees. At this meeting W. L. Henderson, the Union business manager, told the employees that they would be processed through the Local and that they would be represented by the Local Union. At that time Pirkle turned in a number of cards and other employees turned in the cards that they had signed.

Woodrow E. Maddy is Respondent's equipment superintendent and an admitted supervisor within the meaning of the Act. Though John Flora, Respondent's shop foreman and yard supervisor for the Ft. Lauderdale yard, is ordinarily in charge of that yard, Maddy who is over Flora in Respondent's supervisory hierarchy was given Flora's duties from July 28 through August 5 while Flora was absent from the yard. Maddy testified that on August 1 he saw an unidentified stranger in the yard and that he spoke about it to Ora (Bud) M. Paul, a truckdriver and equipment mover in Respondent's employ. At that time Ora Paul told Maddy that there was union activity going on and that some of the employees, including Ora Paul's brother, Maxwell (Boots) L. Paul, were passing out cards.

2. The individual conversations

After learning about the union activity at the Ft. Lauderdale yard, Maddy engaged in wholesale interrogation of the employees concerning their union activities. Maddy's testimony leaves the dates of these interrogations somewhat in doubt but it is clear that it all occurred between July 28 and August 5 as that was the only period of time that Maddy was at the Ft. Lauderdale yard. Though Maddy's recollection of the exact date kept changing, his best recollection was that he spoke to employee Pirkle and the other employees on August 1 which was the date that he allegedly

noticed the stranger in the yard. Maddy admitted that he spoke to 15 employees.[2] Respondent has approximately 32 employees at the yard. Maddy testified that he asked each of these employees whether they had signed a union card. He also admitted that he asked most of them what they knew about the Union or whether they had heard anything about the Union. Maddy spoke to each one individually at various places in the Ft. Lauderdale yard.

William Crane, Respondent's export manager and also an admitted supervisor under the Act, testified that he also engaged in interrogation. He admitted that on August 2, in his office at the yard in the presence of Maxwell Paul and Maddy, he asked Willie L. Jeter whether Jeter had signed the union card. Jeter answered that he had.[3] Crane also admitted that at the same meeting he asked Maxwell Paul whether Paul had signed for the Union.[4]

A number of employees testified that Respondent did not stop with interrogating them concerning whether they signed for the Union or what they heard about the Union. E. Pirkle testified that, in the same conversation in which Maddy asked him whether he had signed a card and what he had heard about the Union, Maddy bragged about firing employees at the Baton Rouge, Louisiana, yard because the employees were trying to get the Union in and that Maddy said he could understand it if it was a Teamsters or Operating Engineers who were trying to organize the Ft. Lauderdale yard but he could not understand the drive by Local 728. Employee J. McGlamory testified that when Maddy asked him whether he signed a card Maddy also asked if he

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[2] E. Pirkle, E. Tatum, J. McGlamory, J. Mandeville, G. Ashcraft, J. Callender, R. Cuthbertson, L. Ellis, A. Fusco, D. Dasher, D. Keith, R. Marchman, L. Brown, R. Sorrells, and J. Aldridge.

[3] Jeter was discharged on August 7, allegedly in violation of Section 8(a)(3) of the Act.

[4] Maxwell Paul's status as an employee or supervisor is discussed *infra*.

went to the union meeting. Employee J. Mandeville testified that, when Maddy asked him whether he signed a card or heard anything about the Union, Maddy also told him that the ones who stayed out of the Union would be better off and get better benefits and specifically that he (Mandeville) would be better off if he didn't sign. Employee J. Callender testified that, in addition to asking him whether he had signed a card and what he knew about the Union, Maddy told him not to sign a union card. Employee R. Cuthbertson testified that Maddy not only asked him whether he signed a card but told him that, if employees did not sign cards, they would get uniforms and a pay raise and that he, Cuthbertson, would be all right as long as he did not sign a card. Employee L. Ellis testified that, in addition to Maddy's asking him whether he signed a card, Maddy told him that he would not be sorry if he did not sign. Employee A. Fusco, Jr., testified that Maddy called him into his office and asked him what he knew about the union meeting the other night. When Fusco equivocated Maddy told him not to lie because he would find the answer anyway. Maddy asked him whether he had been at the meeting and Fusco answered that he was. Maddy asked him if he had signed a card and he answered that he had. Maddy then said "Well, now you know what's liable to happen to you don't you?" Employee J. Baughman testified that, in addition to being asked whether he had signed a card or knew anything about the Union, Maddy told him not to let anyone talk to him into signing a card. Employee D. Dasher testified that Maddy asked him if he knew anything about the Union and that he answered that he had just heard rumors. Maddy asked if Dasher had signed and Dasher answered that he had not. Maddy then told him not to sign because it could only get him in trouble and that if anyone did sign that person would be terminated as soon as he could find out who it was. Employee D. Keith testified that Maddy asked him whether he had signed. He answered that he had not since he was on that job and Maddy

told him to keep it that way. Employee L. Brown testified that, in addition to being asked whether he signed a card and what he knew about the Union, Maddy told him not to sign because there would probably be a skelton crew around and they would be in the money. Brown also testified that about the same time he asked Supervisor John Flora for a raise and Flora told him that there would not be any increase as long as people kept running around signing papers.[5] Employee Clarence Paul testified that his conversation with Maddy occurred in the yard with no one else present. Maddy asked if Paul had signed a card and said that he would get Paul more money if Paul did not sign. Clarence Paul answered that he had signed and that his brother had given him the card.[6] Maddy told Clarence Paul to get the card back, and C. Paul answered that he would if he could but he believed it had been sent in. Maddy then told him that he could fire any instigators who passed out the cards and that he could fire any man who joined the Union. Later in the same day there was a second conversation in which Maddy told C. Paul that he (Maddy) could fire anybody in the yard even if he had to use a safety reason and that if the Union came into the yard Respondent would close the gates. Maddy also said that he would fire the instigators if he could catch them and that he was going to fire any man who signed a union card. James F. Aldridge, who is also alleged as a discriminatee under Section 8(a)(3) of the Act, testified that Maddy asked him whether

[5] Flora admitted telling Brown that the way things looked there wouldn't be any raises for some time and that Brown answered that he wished he hadn't signed for the Union. However, the complaint does not allege that Flora engaged in any activity in violation of Section 8(a)(1) of the Act and, therefore, no finding will be made with regard to this incident.

[6] Clarence Paul credibly testified that in fact Pirkle had given him the card but that he (C. Paul) told Maddy that it was his brother because he was trying to protect Pirkle and he knew that Ora Paul had already told Maddy that Maxwell Paul was involved with the Union.

he signed a card and he answered that he did. Maddy replied that he had been associated with the Union and "I can fix any of those smart boys. I know all about the union, they can't touch the State of Florida."

Maddy specifically responded to the testimony of each of the employees set forth about and categorically denied that he had made any of the statements attributed to him except to the extent that he asked employees whether they had signed for the Union and what they knew about the Union.[7] I am unable to credit Maddy in regard to these denials. After observing the demeanor of the employees as they testified under oath and considering the fact that the tenor of the testimony of the employees is mutually corroborative, I credit that testimony. Maddy did not impress me with his candor and where a conflict in testimony appears between him and the employees I credit the employees.[8]

3. The lunchroom meeting with Maddy

On August 1 Supervisor Maddy was having a conversation with Ora Paul in the lunchroom at the Ft. Lauderdale yard when Maxwell Paul entered the room. Maxwell Paul credibly testified as follows: Maddy asked what Maxwell Paul knew about the Union's coming in and Maxwell Paul answered that he didn't know anything much. Maddy asked Maxwell Paul if he signed a card to join the Union and Maxwell Paul answered that he did. Maddy asked if he could get his card back and he answered that it had already been turned in and he would not get it back. Maddy then said, "Well, I will personally have your pink slip of termination in the morning." Maddy asked Maxwell Paul if

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[7] Maddy denied having any conversation with J. Baughman.

[8] All the employees who could recall the date of the conversation with Maddy with accuracy placed the conversation as occurring between August 1 and August 5, with the bulk of the conversations on August 1. I so find.

anyone else signed a card and Maxwell Paul answered that he didn't know but as far as he did know everybody had signed. Maddy asked if Jeter had signed and Maxwell Paul answered that he didn't know. Maddy then said "Well, if he has, I have his pink slip, too, and anybody—anyone else who has signed a card." Maddy asked who the instigator was and Maxwell Paul answered that he could not tell him. As Maxwell Paul was leaving the room he saw employee Jim Bowen come into the lunchroom and heard Maddy ask him if the had signed a card. Bowen answered that he had. He also heard Maddy speak to Dasher, the night watchman, and heard Maddy ask Dasher whether he had signed a card. Dasher answered that he didn't know what Maddy was talking about and Maddy replied that he had better not sign.

Maddy recalled the conversation in the lunchroom but he denied the substance of Maxwell Paul's testimony. Maddy testified as follows: Maddy was talking to Bud Paul when Maxwell Paul entered the lunchroom. Maddy asked Maxwell Paul what he knew about the Union and then Bud and Maxwell Paul got into a heated discussion about the merits of unionization. Maddy said that, if something didn't happen and they didn't start getting work done, he would get a whole handful of pink slips. Sometime during the conversation Clarence Paul walked into the room. Maddy specifically denied that he asked Maxwell Paul whether he had signed a union card and stated instead that Bud Paul had asked that question. In a like vein Maddy denied that he questioned Maxwell Paul about who the instigator was.

Ora Paul's version of the conversation is somewhere between that of Maxwell Paul and Maddy. Ora Paul testified as follows: It was Maddy who asked Maxwell Paul if he signed a union card and Maddy asked Maxwell Paul who was creating all the disturbance. Maddy said that the men were slowing down and creating a disturbance and were getting dissatisfied with their Employer and he would like to find out who those men were who were causing the

disturbance because he would give them their pink slips to terminate them. After this conversation Clarence Paul came into the room.

Employee Dasher testified that he was outside the lunchroom and overheard part of the conversation and that he heard something about the Union not doing any good and causing loss of jobs.

I credit Maxwell Paul's testimony with regard to this conversation. On significant details such the question of who asked Maxwell Paul whether he had signed a union card, Maddy and Ora Paul differed in their testimony. My observation of both Maddy and Ora Paul as they testified leads me to the conclusion that both are less than reliable in their testimony. On the other hand Maxwell Paul was very convincing.

4. The conversation in Crane's office

As set forth above, Crane admitted that in the presence of Maxwell Paul and Maddy he asked Willie Jeter and Maxwell Paul whether they had signed union cards. Maddy's testimony was substantially the same. Maxwell Paul credibly testified that more was said in this conversation, as follows: Before Jeter came into Crane's office Crane asked Maxwell Paul whether he signed a union card. Paul answered that he had. Crane asked if he was the instigator and Paul answered that he was not. Crane then asked if Jeter had signed a card or if Bowen, Jack Carr, or Jim Aldridge had signed. Paul answered that he didn't know. Crane then asked Paul to go out and get Bill Jeter. Paul went into the yard and returned with Jeter. Crane interrogated Jeter asking why he didn't come to the Company first. At that point Maddy said that the same thing had happened before and they had gotten rid of the instigators and they could do it again.

Willie Jeter in his testimony concerning this conversation did not remember Maddy's remark about getting rid of

instigators but he did testify that Maddy asked him whether he signed a card and he answered he had, that he was asked who else joined and he answered he did not know, and that Maddy said that that was all right because he, Maddy, would find out who they were.

I credit Maxwell Paul's version of this conversation. The testimony of both Crane and Maddy where it differed from Maxwell Paul's was unconvincing. My observation of Jeter leads me to the conclusion that he was an honest witness telling all that he recalled but that Maxwell Paul had a fresher recollection of exactly what happened at the meeting.

5. The employee status of Maxwell Paul

Maxwell Paul testified as follows: He was hired in 1962 and worked until August 7 when he was discharged.[9] Some time prior to his discharge he worked in the overseas shipping and receiving department where he received, crated and shipped materials for overseas jobs. While he spent 10 to 20 percent of his time ordering parts, his work consisted primarily of manual labor. He was a leadman in a 4-man department. He sometimes showed new men how to crate materials but he worked with the other men doing the same jobs. Bill Crane who was his supervisor never told him that he (Paul) was a supervisor. He was hourly rated at $2.50 an hour, punched a timeclock, and had no special privileges. Though he relayed messages and orders from Crane, he never attended supervisory meetings. He never hired, fired, or recommended the hire or fire of any employee, had no authority to grant time off on his own, and never reprimanded or disciplined any employee. With regard to the granting of time off, he would ask Crane and relay Crane's decision. On occasions Crane would ask him how a new man was doing. With

[9] The complaint does not allege that Maxwell Paul was discharged in violation of the Act and therefore that question was not litigated.

regard to the ordering of parts, he was given the orders which were already written up and okayed. Crane decided what overtime work was needed and named who was to work.

Supervisor William Crane testified as follows: New employees were told to report to Maxwell Paul and Paul would tell them what to do. Four or five employees generally worked in Paul's department and at times there were extras so that there were eight or nine employees in all. A normal procedure was for Crane to give the shipping schedules to Paul and tell him to get the materials crated. Paul handled the entire shipment from purchases through final recordings. Paul picked men for overtime work at his discretion. In January, while Crane was away from the yard, Paul handled Crane's affairs. In December 1967, after Crane had been sick for 5 days, he came back and found things in good order. Paul interviewed employees and recommended their hire. One of these employees was Urbano Matos who was interviewed and hired in July. Another employee interviewed by Paul was hired by Flora. Paul recommended the discharge of employee Rip Miller in or about December 1967 and the recommendation was followed.[10] Paul got 40 cents an hour more than the next highest paid employee in his department.

Where a conflict in testimony exists between Maxwell Paul and Crane, I credit Paul. Based on this credited evidence, I find that Maxwell Paul was not vested with the type of independent discretion in the performance of his duties with relation to other employees so as to warrant the finding that he was a supervisor. Though he was

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[10] Maxwell Paul specifically denied that he had recommended the discharge of Miller and testified that he had an argument with Miller as a coemployee because he, Paul, didn't think that Miller was holding up his end of the work and that Miller walked off the job and didn't return, but that he never recommended that Miller be discharged.

clearly a key man as well as a strawboss, he did not have the authority, with the use of independent judgment, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly direct them or adjust their grievances, or effectively recommend such action. I find, therefore, that Maxwell Paul was not a supervisor within the meaning of Section 2(11) of the Act.

6. Conclusions as to the alleged violations of Section 8(a)(1)

Based on the credited testimony set forth above, I find that Respondent violated Section 8(a)(1) of the Act by the activities of its supervisor, Maddy, who between August 1 and 5:

(1) Interrogated 20 of the approximately 32 employees at the Ft. Lauderdale yard concerning whether they signed a card for the Union, interrogated most of those 20 employees concerning what they knew about the Union, and interrogated employees McGlamory and Fusco about the union meeting.

(2) Implied that employees would be discharged if they joined the Union by telling employee E. Pirkle that Respondent had discharged employees for union activity in Louisana, and by telling employee Fusco that he knew what was liable to happen to him if he signed.

(3) Directly threatened to discharge employees because of their union activities in statements to employees Dasher, Clarence Paul, and Maxwell Paul.

(4) Promised benefits to employees for not joining the Union as expressed to employees Mandeville, Cuthbertson, and Brown.

(5) Threatened to close the plant if the Union came in as expressed to Clarence Paul.

(6) Instructed employees Callender, Baughman, Keith, and Dasher not to sign Union cards.

In addition I find that Respondent violated Section 8(a)(1) of the Act by the activities of its Supervisor Crane who on August 2 interrogated Maxwell Paul and Willie Jeter concerning whether they signed cars for the Union.

B. *The Discharge of James F. Aldridge.*

James F. Aldridge worked for Respondent as an engine rebuilder and automotive machinist from January 2, 1967, to August 5, 1968, when he was discharged. On Friday, August 2, in the engineroom at the Ft. Lauderdale yard Aldridge had a conversation with Supervisor Maddy. Maddy asked him if he had signed a card for the Union, and he answered that he had.[11] Maddy asked why he signed and Aldridge answered that the cost of living was going up but that the wages didn't. Maddy told him that that was not the way to do it, that he (Maddy) had been associated with the Union and "I can fix any of those smart boys. I know all about the union, and they can't touch the State of Florida." About 5 o'clock the following Monday, August 5, Supervisor Flora summarily discharged Aldridge and told him to turn in his keys and get his tools out. When Aldridge asked what he had done wrong, Flora answered that there was a warped camshaft in the Reo motor that Aldridge had worked on.

The decision to discharge Aldridge was made solely by Supervisor Maddy. During the time that Maddy was filling in for Flora at the Ft. Lauderdale yard, two engines which had been rebuilt by Aldridge were put on the test stand and did not perform properly. One was a Reo engine

[11] Maddy admitted that he asked Aldridge whether he signed a card but denies that Aldridge answered in the affirmative. Instead Maddy testified that Aldridge told him that he had not signed but that he thought it might be a good idea. Maddy denies that there was any further conversation.

which had a warped camshaft that had to be replaced. The other was a Waukesha engine which also needed some additional work. Both motors were delayed in shipment because of the needed repairs. Maddy testified that he thought Aldridge had fouled up both engines and as a result, when Flora returned to the yard, Maddy told him that something would have to be done about the situation or somebody else would be doing Flora's job. Flora confirms the fact that it was solely Maddy's decision to discharge Aldridge by testifying that, when he returned to the yard on August 5, Maddy told him that Aldridge had messed up some engines and that he, Flora, had either to let Aldridge go or that he, Flora, would be let go.[12]

As noted above, Aldridge worked for Respondent for over a year and a half. He was hired at $2.50 an hour and during his period of employment he received three 10-cent-per-hour raises, the last about June 15. While employed he rebuilt approximately 80 engines. During the entire period of his employment no one from Respondent ever complained to Aldridge about his work. About June Flora did mention to Maddy that he had received a phone call from Louisiana and was told that a couple of Reo engines had the rods in backwards. However, Aldridge answered that in that particular model engine the rods did go in in an opposite direction from most engines and he then took some oil pans off similar engines to show Flora that they

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[12] It is apparent from the testimony of both Flora and Maddy that Flora had nothing to do with the decision to terminate Aldridge. It follows that Flora's testimony about his father-son type of conversations with Aldridge about Aldridge's drinking, about Aldridge being inefficient in the ordering of parts, and about his feeling that they were going to have to do something with Aldridge was irrelevant with regard to the reason for Aldridge's discharge. Even if this were not the case Flora admits that he knew when Aldridge was hired that he drank and he never told Aldridge that he had to stop drinking. He never reprimanded Aldridge with regard to the ordering of parts or with regard to his work generally.

did go in the way he said. Nothing else was said of this incident. No supervisor ever made any comment to Aldridge about any other motor or engine that he worked on. With regard to the two engines that didn't properly work on the test stand shortly before his discharge, Aldridge credibly testified as follows: In putting in the camshaft when the engine was rebuilt he checked it as best he could with the equipment available. However, it didn't appear until the motor was tested on the test stand that the camshaft was warped. He then replaced the camshaft. He never had a similar problem in the yard. With the Waukesha engine that wasn't working properly on the test stand, he took out the camshaft and replaced it with another camshaft but found that there was nothing wrong with the original camshaft and there was a vacuum leak instead.

2. Conclusions as to the discharge of Aldridge

Aldridge engaged in an activity that is protected under Section 7 of the Act when he signed the union card. Respondent obtained knowledge of this protected activity when it unlawfully interrogated Aldridge on Friday, August 2. Aldridge was discharged on Monday, August 5. The facts found in section A, above, establish that Respondent bore a virulent animosity toward the Union as shown by the commission of many violations of Section 8(a)(1) of the Act. Included in these violations was the direct threat to employees that they would be discharged if they engaged in union activity.[13]

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[13] Of the 20 employees that Respondent unlawfully interrogated concerning the signing of union cards, 14 answered that they had not signed cards and 6 answered that they had. The six who had admitted signing cards were Fusco, Clarence Paul, Maxwell Paul, Jim Bowen, J. Aldridge, and Jeter. The two alleged discriminatees, J. Aldridge and Jeter, were both among the group of six that had indicated they had signed cards. Maxwell Paul was also discharged about this time but as he is not allowed as a discriminatee in the complaint no inference will be drawn from his termination.

The General Counsel has established a *prima facie* case against which the Respondent's defense must be evaluated. Supervisor Maddy does not contend that he considered anything other than the allegedly poor work by Aldridge on two particular engines before coming to the decision to discharge Aldridge. As Maddy's decision was a sole and final one with regard to the discharge, any doubts Flora may have had as to the caliber of Aldridge's work, which doubts were buried in the bottom of Flora's mind and unexpressed to either Maddy or Aldridge, have no bearing on the instant case. The mere fact that Maddy gave an ultimatum to Flora in directing Flora either to fire Aldridge or be fired himself indicates that Aldridge's discharge was not based on run-of-the-mill business considerations as Respondent contends. Aldridge had worked for over a year and a half and during that time Respondent considered that work to be of sufficient worth to warrant three increases in pay. During the entire time he was never reprimanded for poor work. Maddy, who had very little contact with Aldridge's work, as he was just filling in for Flora for a limited time, never bothered to even ask Flora what kind of worker Aldridge was but instead on the basis of an extremely limited observation summarily decided to discharge him.

I find that Respondent's alleged reason for discharging Aldridge was a transparent pretext to shield the real reason, which was Aldridge's protected activity in signing a union card. I therefore find that Aldridge was discharged in violation of Section 8(a)(3) and (1) of the Act.

C. *The Discharge of Willie L. Jeter*

Facts

Willie L. Jeter worked for Respondent from his date of hire in the latter part of 1961 until his discharge on August 7. He worked in the freight and shipping department at the Ft. Lauderdale yard where he received, packed, crated,

and hauled freight. Though he was not a regular driver in the freight department, he did make three or four local trips a week as well as an average of one out-of-State trip a month.

On July 31 he signed a union card. As is more fully set out in the section above entitled "The conversation in Crane's office," Respondent learned that Jeter had signed a card for the Union after unlawfully interrogating him. August 2 was on a Friday. The following Wednesday, August 7, Supervisor Crane called Jeter into his office in the middle of the day, paid him till the end of the day, and summarily discharged him, telling him that he hated to do it but that it was out of his hands. Crane told Jeter that he was being let go because he did not operate the forklift and because the day before he had left at 4:30 without saying anything to Crane.[14]

Respondent contends that Jeter was discharged because he was unable to complete reports on over-the-road trips by himself, he left work at 4:30 p.m. on August 6 without checking with Crane, and he was unable to drive a fork-lift truck.

Jeter was in Respondent's employ approximately 7 years. He was hired at $1.00 an hour and during his employment he received increases raising his pay to $2.10 an hour. The last wage increase was 10 cents an hour in or about May. Neither Crane nor any other supervisor had ever complained to him about his work. Crane admitted that Jeter was able to do the work with regard to the physical driving of that truck.

Respondent contends that Jeter's inability to fill out the forms relating to over-the road truck driving became a

[14] Crane testified that the reason he gave Jeter for the discharge was that Jeter could not make out the fuel reports and that he failed to report before leaving the yard on August 6. Crane also testified that he might have said something about Jeter's not driving the forklift. I credit Jeter.

problem on August 6 because Maxwell Paul who had previously helped Jeter in filling out the forms was discharged on that date. However, Jeter's testimony that Maxwell Paul helped him prepare the documents simply because it was quicker for the two of them to do it was never questioned by Respondent and no one ever told Jeter that he should make out the forms by himself. As the forms only had to be made out for out-of-State trips and Jeter only took about one such trip a month, the completion of the forms must have been a very minor part of his duties.

Respondent contends that Jeter's leaving work at 4:30 on August 6 was a serious matter because Maxwell Paul was absent and as second senior man Jeter knew that, when Maxwell Paul was not there, he was in charge. However, Crane admits that he never told Jeter that he (Jeter) was going to be boss. As 4:30 p.m. was the normal quitting time, no one told Jeter that he was supposed to work overtime, he was never told to check with Crane before punching out, and he was never told that he was in charge of the other employees, this defense cannot be taken seriously.

The third item raised by Respondent is that Jeter did not drive the forklift. However, about a year and a half before the discharge, Crane told Jeter to let the younger men drive the forklift and Jeter hadn't operated it since. It is difficult to see why this duty which was apparently a matter of minor concern for a year and a half before the discharge became suddenly important as a reason for discharging Jeter.

The General Counsel has established a *prima facie* case by evidence that Jeter engaged in protected activity within the meaning of Section 7 of the Act in the signing of a card, that Respondent gained knowledge of this activity through its unlawful interrogation on August 2, that Respondent demonstrated its virulent animosity toward the Union by engaging in the severe pattern of 8(a)(1) conduct

described above in section A which included the threat to discharge employees who joined the Union and the specific threat to fire Jeter if he signed for the Union, and that Respondent discharged Jeter on August 7, just 5 days after it learned of Jeter's protected activity. Respondent's asserted reasons for discharging Jeter are so patently frivolous that I can only conclude that they are a pretext to disguise the real reason for Jeter's discharge, namely his protected activity in signing a union card. I therefore find that Jeter was discharged in violation of Section 8(a) (3) and (1) of the Act.

D. *The Alleged Violations of Section 8(a)(5) of the Act*

1. The facts

a. *The appropriate unit*

The complaint, as amended, alleges and the answer, as amended, admits that:

> All employees employed by the Respondent at its Broward County equipment yard,[15] excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

b. *The Union's demand for recognition*

On August 2 W. L. Henderson, the Union's business manager, sent a letter to Dan Stoneberger, Respondent's vice president and a supervisor within the meaning of the Act, which read as follows:

> This is to inform you that we now represent a majority of your Equipment Mechanic employees in this jurisdiction, namely, Broward County.

[15] Referred to herein as the Ft. Lauderdale yard.

> We would like recognition as their collective bargaining agent and will be happy to discuss this with you at your earliest convenience.

On August 5 Stoneberger called Henderson's office and in Henderson's absence spoke to Frank E. Harper, the Union's assistant business amnager. Stoneberger asked Harper if he had ever heard of the IBEW representing Respondent's kind of employees. When Harper started answering, Stoneberger told him not to bother because he would talk to Henderson. The following day, August 6, Stoneberger called again and did speak to Henderson. Stoneberger said that he received the letter but that he didn't think that the IBEW could represent his employees. Stoneberger also said that he didn't think that the Union represented a majority of employees at the Ft. Lauderdale yard. Henderson replied that the Union could represent the employes and that they did represent a majority.

On the same date, August 6, Henderson wrote a second letter to Stoneberger as follows:

> We have been advised that on August 5, 1968 you discharged two (2) employees because of their membership or activities in behalf of this Labor Union. Be advised that we shall seek relief for this discriminatory practice by filing a charge with the National Labor Relations Board, unless these employees are immediately reinstated with back pay.
>
> In my letter to you of August 2nd I specifically advised you that we represent a majority of your employees performing repair work on equipment and are employed by you as Equipment Mechanics. I can only assume by your discharge of James Aldridge and Jack Carr that you are refusing to recognize and negotiate with us. If we are mistaken, that is, if you are willing to recognize our majority representative capacity, please advise us of that fact immediately and we can arrange to prove that we represent the majority of

your employees by any fair and impartial means. We are anxious to commence negotiations covering wages, hours and conditions of employment for the employees we represent, and therefore we request that you take prompt action to accept us as the collective bargaining agent for the employees in the Unit described above. I shall await your response.

On August 9 Stoneberger wrote to Henderson as follows:

> Thank you for your letter of August 2, 1968 and August 6, 1968.
>
> Please be advised that we sincerely doubt that you represent a majority of our employees at our Broward County equipment yard, and therefore, do not recognize you as their bargaining representative at this time.
>
> Accordingly we respectfully invite you to use such procedures [sic] as are available to you under applicable Federal law.

On September 30 Henderson sent the following telegram to Stoneberger:

> PLEASE REFER TO MY LETTERS OF AUGUST 2 AND 6. IN FURTHER CLARIFICATION OF THE UNIT OF YOUR EMPLOYEES WHICH WE CONTEND WE REPRESENT. BE ADVISED THAT WE REPRESENT A MAJORITY OF YOUR EMPLOYEES AT YOUR BROWARD COUNTY EQUIPMENT YARD. WE DEMAND RECOGNITION AND ASK FOR IMMEDIATE NEGOTIATIONS AND WE ARE WILLING TO PROVE OUR REPRESENTATIVE CAPACITY BY A CROSS CHECK OF OUR AUTHORIZATION CARDS OR ANY OTHER FAIR AND IMPARTIAL MEANS OF PROVING OUR MAJORITY STATUS. PLEASE ADVISE

c. *The number of employees in the bargaining unit and the Union's majority*

As noted above, the Union demanded recognition by letter dated August 2 and Respondent through Stoneberger responded to their demand in a telephone conversation to Henderson on August 6. In that conversation Stoneberger questioned the propriety of an IBEW local representing

Respondent's employees and the Union's majority status, and in doing so he, in effect, on that date refused the Union's demand to bargain. As this refusal to bargain first occurred on August 6, the Union's majority status on that date must be considered.

General Counsel's Exhibit 2(b) is a list of 30 employees. It was stipulated that these 30 were all employees in the appropriate unit on August 6. It was further stipulated that the parties could introduce additional evidence concerning employees who should or should not be on the list. Evidence was so introduced with respect to four individuals: Maxwell Paul, Billy Harris, O. Natali, and W. Jeter. As I have found that W. Jeter was discharged in violation of Section 8(a)(3) of the Act and will therefore be entitled to full reinstatement, his name must be added to the list. As I have found that Maxwell Paul, for the reason set forth in detail above, was an employee and not a supervisor within the meaning of the Act, his name should also be included because he was still employed for at least part of the day on August 6.[16] The General Counsel contends that Billy Harris and O. Natali should also be included on the list. Harris and Natali both testified that they are field mechanics who receive no supervision from the Ft. Lauderdale yard and whose job is to maintain equipment while it is in the field. It is clear from their testimony that any connection they have with the Ft. Lauderdale yard is a casual one and that they are not employed *at* the Ft. Lauderdale yard so as to be included within the appropriate unit. They therefore cannot be added to the list.

I find that the total employee complement in the appropriate unit on August 6 was 32 employees. Of these 32 employees 20 signed cards for the Union. The cards were

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[16] Paul testified that he worked until about August 7. Crane testified that Paul had been terminated on August 6.

all dated between July 18 and August 1, were all properly authenticated, and were admitted in evidence.[17] At the time the August 2 demand for recognition was written the Union had all 20 cards in its possession.

[17]

Employee	Date Card Signed	Classification
1. Wilson, F.	July 31	Machinist
2. Marchman, R.	July 19	Mechanic
3. Callender, J.	July 18	Mechanic
4. Pirkle, E.	July 18	Mechanic
5. Ellis, L.	July 29	Mechanic
6. Keith. D.	July 30	Mechanic
7. Brown, L.	July 20	Mechanic
8. Fusco, T.	July 22	Mechanic
9, Mandeville, J.	July 29	Mechanic
10. Pirkle, T.	July 19	Mechanic Helper
11. Tatum, E.	July 24	Welder
12. Ashcraft, G.	July 29	Welder
13. Sorrells, R.	July 29	Welder
14. Paul, C.	Aug. 1	Painter
15. Dominguez, E.		Painter
16. Hernandez, R.		Painter
17. Jeter, W.	July 31	Warehouse Man
18. Andrix, E.		Warehouse Man
19. Matos, V.		Warehouse Man
20. Dominguez, H.		Laborer
21. Forte, P.		Laborer
22. Robledo, A.		Laborer
23. McGlamory, J.	July 31	Truck Driver
24. Romich, C.		Truck Driver
25. Paul, O.		Truck Driver
26. Gessner, B.		Clerk Parts Purchasing
27. Butler, J.		Parts Pickup Man
28. Baughman, J.	Aug. 1	Parts Storekeeper
29. Cuthbertson, R.	July 31	Lubeman
30. Bowen, J.		Messenger
31. Aldridge, A.	July 22	Engine Rebuilder
32. Paul, M.	July 31	Warehouse Man

On the list "Wilson" has the initial "F.", while the card is signed "Wiley F. Wilson." The list also shows "T. Fusco" while the card is signed "Anthony Fusco, Jr." As both card signers credibly testified that they were employed during the time period that included August 6, I conclude that they are the "Wilson" and "Fusco" named in the list.

2. The Respondent's defenses

In substance Respondent contends that no violation of Section 8(a)(5) should be found because:

a. The Union's demands for recognition dated August 2 and August 6 related solely to a unit of equipment mechanics and that such a unit differed so substantially from the stipulated appropriate unit that no obligation on the Respondent's part could arise to bargain in the appropriate unit.

b. The employees who signed cards for the Union were merely applying for membership in the Union and were not authorizing the Union to represent them for the purpose of collective bargaining. Therefore, the Union was never authorized to represent the employees in the bargaining unit.

c. The Union would not fairly represent two employees whose national origin was Cuban and one negro employee in the bargaining unit.

d. Respondent had a good-faith doubt that the Union represented a majority of the employees in the bargaining unit.[18]

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[18] As to the Respondent's good-faith doubt that the Union represented a majority of its employees, Respondent in its brief states that the doubt was based on the fact that only three employees and one supervisor had admitted signing a card, that one employee had been coerced because he refused to sign, and because a supervisor (Maxwell Paul) had purportedly been soliciting for the Union.

Ora Paul testified that employees Cuthbertson and McGlamory told him that he would have to join the Union or get out. He also testified that employee Marchman made the same threat. Cuthbertson, McGlamory, and Marchman alll denied that they told Ora Paul he would have to leave the job if he didn't join the Union. I credited the three denials.

For the reasons set forth above I have found that Maxwell Paul was not a supervisor within the meaning of the Act. Even if he were, the record does not establish that he solicited the employees, upon whom the Union's majority status rests, to join the Union.

3. The facts with regard to the fair representation issue

With regard to the Respondent's allegations concerning the Union's discrimination in membership policy, the facts are as follows:

Joseph Butler is the only negro employed by Respondent at the Ft. Lauderdale yard. Though he was employed since September 1967, he was unaware that the employees were joining the Union and no one ever asked him to apply for membership. Butler is a parts pickup man and therefore is in the bargaining unit. W. L. Henderson, the Union's business manager, testified without contradiction that he was unaware that any Negro was employed at the Ft. Lauderdale yard, that at the present time the Union has no Negro member, and that the Union has had negro members in the past and is now processing one Negro for membership. He further testified that the Union does not discriminate against any minority group on the basis of race, creed, national origin, or color.

Two employees of Cuban origin, Eneldo Dominguez and Pedro Alberto, did sign union cards. These cards were dated July 29 and August 1 respectively. Employee Elbert Pirkle took these cards together with the $10 initiation fee for each employee and kept them in his truck until December 9. Pirkle testified that he intended to give the cards to the Union when they were given to him but that he spoke to employee Clarence Paul who told him to hang on to the cards until things cooled off because they did not want to get Dominguez and Alberto fired. Pirkle further testified that he forgot he had them in his truck until Thursday, December 5 (during the course of this trial). Union Business Manager Henderson testified that he heard for the first time about the cards of Dominguez and Alberto during the trial on December 5 and he called Pirkle that evening. Henderson asked Pirkle for the cards and took them on December 9. Henderson testified that the cards would be processed.

I find Pirkle's allegation that he kept possession of the Dominguez and Alberto cards to protect those employees and later because he forgot about them simply incredible. However, I do credit Henderson's assertion that he found out about those cards during the trial and then took possession of them. There is no evidence in the record, other than set forth above, to be evaluated in determining whether in fact the Union does discriminate because of color or national origin.[19]

4. Analysis as to the alleged violation of Section 8(a)(5)

a. *The fair representation issue*

It can well be argued that a labor organization whose membership policies invidiously discriminate against employees on the basis of race or national origin inherently is incapable of fairly representing such employees. It can furth[illegible] be argued that such inability to fairly represent should be a defense against an 8(a)(5) allegation where members of the discriminated against group are part of the bargaining unit. Cf. *United Packinghouse, Food and Allied Workers International Union, AFL-CIO* v. *N.L.R.B.*, .. F.2d .. (C.A.D.C.) 70 LRRM 2489. However, a legal analysis of these propositions would only be warranted in a case where the evidence on the record establishes that the Union does so discriminate.

I have found that the reasons given by Pirkle for his retaining the union cards of Dominguez and Alberto were

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[19] In footnote 7 of its Brief Respondent suggests that it was not allowed to fully explore this issue. During the trial Respondent offered to prove that if Ora Paul were permitted to testify he would testify that several employees told him that they did not approach Joe Butler because they didn't want him in the Union. I ruled that such testimony would be hearsay unless Respondent made and supported the contention that the employees were acting as agents of the Union. No such contention was made.

not credible. In the absence of any other explanation I believe that a fair inference can be made that Pirkle held the cards because of the national origin of those two employees. From the evidence on the record it is more difficult to infer that Joseph Butler was not asked to sign a union card because he was Negro. However, even if such an inference can be made, it must be noted that all of the solicitation of cards at the Ft. Lauderdale yard were made by employees. The Union did not seek out Pirkle and designate him as its agent in the solicitation of cards. Rather, Pirkle who Respondent in its brief describes as "the self-appointed employee organizer" received cards from an employee in another shop and other cards from the Union. He distributed some and gave some to other employees to distribute. There is absolutely no evidence in the record that the Union had knowledge that there was any discrimination based on race or national origin prior to the date of the trial. Shortly after becoming aware of the problem the Union took possession of the cards signed by Dominguez and Alberto and Henderson has testified they will be processed. In no sense can it be said that the Union ratified the conduct of the employees who solicited cards. I therefore find that the failure to solicit a card from Butler and the withholding of the cards of Dominguez and Alberto can not be attributed to any membership policy of the Union. The admission by Business Manager Henderson that at the present time there are no Negro members in the Union indeed raises a suspicion. However, standing alone it does not prove that the Union had discriminatory membership policies, particularly where Negroes have been members in the past and the application of a Negro is now pending. As the evidence does not establish that the Union's membership policies discriminate on the grounds of race or national origin a legal analysis of the propositions of law mentioned above is not in order.

b. *The unit and the demand*

The appropriate unit as stipulated to at the hearing consists of all Respondent's employees at the Ft. Lauderdale yard with the usual exclusions (office clericals, guards, professionals and supervisors). Of the 32 employees in this unit on August 6, 8 were mechanics, 1 a mechanics' helper, 1 an engine rebuilder, 1 a machinist, and the balance welders, painters, warehousemen, laborers, truck drivers, and other nonmechanics. The Union's demand for recognition dated August 2 states that the Union represents a majority of equipment mechanics. The letter of August 6 states that the Union represents a majority of employees performing repair work on equipment and who are employed as equipment mechanics. Not until the September 30 telegram did the Union specifically tell Respondent that the Union sought representation in an all-employee unit.

The question presented is whether the Union's demand of August 2 sufficiently identified the unit in which bargaining was sought to provide a foundation for a finding that Respondent refused to bargain in an all-employee unit. In determining whether the parties understood that an "all employee" unit was the subject matter of the Union's demand, the wording of the demand in itself is important. However, all the surrounding circumstances must be considered, as no magic words are needed in this field of law. *Benson Wholesale Company, Inc.*, 164 NLRB No. 75. The important question is whether the Employer knows he is being asked to bargain with the Union as a representative of a certain group of employees. The Union's August 2 letter did mention equipment mechanics. However, Respondent, through its unlawful interrogation, did ascertain that a mechanic, a painter, two warehousemen, a messenger, and an engine rebuilder had signed cards for the Union.[20] On August 6 when Respondent's vice presi-

[20] Fusco, C. Paul, M. Paul, Jeter, and Aldridge. In addition Ora Paul, a truck driver, told Respondent that he had been solicited to join the Union.

dent, Stoneberger, called Union Business Manager Henderson, Stoneberger said that he doubted that the Union represented a majority of the employees at the Ft. Lauderdale yard. Henderson replied that he did represent the majority. There was no mention of mechanics as such and both the Union and Respondent appeared to have an all-employee unit in mind. Certainly Respondent did not question the size of the unit nor indicate that it thought the Union was seeking a mechanics only unit. Respondent's stated reasons for not recognizing the Union were that Respondent did not think the IBEW could represent its employees and that Respondent doubted that the Union represented a majority of employees at the Ft. Lauderdale yard. The refusal was not based on the scope of the Union's demand. In its followup demand of August 6 the Union's letter also contained the phrase "equipment mechanics." However, in its reply of August 9 Respondent wrote that it doubted the Union represented a majority of "our employees at our Broward County equipment yard" and therefore refused to bargain. The language of Respondent's August 9 letter makes it clear that Respondent was interpreting the Union's demand as one which encompassed an all-employee unit. As Respondent understood the Union's demand to be in an all-employee unit and as Respondent made no objection to the narrow language of the Union's letter of August 2 and did not base its refusal to bargain on such language, I find that the Union did make a proper demand for bargaining in the appropriate unit.

c. *Majority status*

On August 6, the date of Respondent's refusal to bargain with the Union, 20 out of the 32 employees in the bargaining unit had signed cards for the Union. These cards were not the ordinary authorization cards but were applications for membership in the Union. The Board, with court approval, has long held that signing of an

application for membership in a labor organization in itself authorizes that labor organization to bargain for the card signer. *Blade-Tribune Publishing Company,* 161 NLRB 1512; *Delaware-New Jersey Ferry Company,* 30 NLRB 820, enfd. in pert. part 128 F.2d 130 (C.A. 3); *N.L.R.B.* v. *Somerset Shoe Company,* 111 F.2d 681 (C.A. 1). I find that on August 6 the Union was authorized by a majority of the employees in the appropriate bargaining unit to represent them in collective bargaining with Respondent.

d. *The alleged good-faith doubt*

The criteria for determining whether an employer is acting in good or bad faith in questioning the Union's majority is set forth in *Hammond & Irving, Incorporated,* 154 NLRB 1071, where the Board held:

> The Board has long held that an employer may insist upon a Board election as proof of a union's majority if it has a reasonable basis for a bona fide doubt as to the union's representative status in an appropriate unit. If, however, the employer has no such good-faith doubt, but refuses to bargain with the majority representative of its employees because it rejects the collective-bargaining principle or desires to gain time within which to undermine the union and dissipate its majority, such conduct constitutes a violation of Section 8(a)(5) of the Act. (*Joy Silk Mills, Inc.,* 85 NLRB 1263, enfd. as modified on other grounds 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.) In determining whether the employer's action was taken to achieve either of the said invalid purposes, the Board considers all the surrounding circumstances as well as direct evidence of motivation. Absent such direct evidence, where extensive violations of the Act accompany the refusal to grant recognition, they evidence the employer's unlawful motive and an inference of bad faith is justified.

In applying these criteria the Board has held that the commission of narrow violations of Section 8(a)(1) of the Act do not necessarily indicate a rejection of the collective-bargaining principle. *Fashion Fair, Inc.*, 173 NLRB No. 28; *Grafton Boat Co., Inc.*, 173 NLRB No. 150; *J. C. Penney Company, Inc.*, 172 NLRB No. 82. However, the Board has consistently held that substantial violations of Section 8(a)(1) and (3) of the Act do warrant a conclusion that an employer does not have good faith in questioning a union's majority status. In the instant case Respondent engaged in extensive violations including wholesale unlawful interrogation, threats to discharge employees because of their union activities, promises of benefits to employees to refrain from union activity, and the discharge of two employees because they joined the Union. This conduct on the part of the Respondent evidenced its complete rejection of the collective-bargaining principle rather than any good-faith doubt that the Union had a majority. Respondent may not destroy the very conditions needed for a fair election and at the same time successfully maintain that an election is the sole means for determining the desires of the employees. Respondent's unlawful coercive conduct began on August 1 immediately after it learned that its employees were engaging in union activities and culminated with the discharge of Jeter on August 7, the day after it notified the Union that it would not bargain. The Respondent's conduct both before and after the demand for recognition is part of the same pattern which clearly establishes Respondent's rejection of the collective-bargaining principle. *Gibson Products Company of Washington Parish, La., Inc.*, 172 NLRB No. 243. Such conduct violates Section 8(a)(5) of the Act. *Jerome T. Kane d/b/a Kane Bag Supply Company*, 173 NLRB No. 180; *Rish Equipment Company*, 173 NLRB No. 136; *Bauman Chevrolet, Inc.*, 173 NLRB No. 78; *Heck's Inc.*, 172 NLRB No. 255; *Beaver Bros. Baking Co., Inc. d/b/a American*

Beauty Baking Co., 171 NLRB No. 98.[21] Violations of the Act both before and after a demand for recognition may show bad faith. *San Angelo Packing Company*, 163 NLRB No. 118; *Boot-Ster Manufacturing Company, Inc.*, 149 NLRB 933, enfd. 361 F.2d 325 (C.A. 6).

Respondent's attitude toward collective bargaining was well summed up in Supervisor's Maddy's remark to employee Aldridge: "I can fix any of those smart boys. I know all about the union, they can't touch the State of Florida."

I therefore find that Respondent on August 6 did not have a good-faith doubt that the Union represented a mapority of employees in the appropriate unit.

e. *Conclusion as to the 8(a)(5) allegation*

Having found that the Union made a demand for recognition in an appropriate unit, that the Union was authorized by a majority of the employees in said unit to represent them, that the Respondent refused to bargain with the Union, and that the Respondent did not have a good-faith doubt that the Union represented the majority of the employees in the unit but instead sought by unlawful means to undermine the Union, I find that the Respondent violated Section 8(a)(5) and (1) of the Act.

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[21] In reaching this conclusion I am not relying on the testimony of employee Dasher who testifies that Maddy admitted to him that the Union had 51 percent of the employees. Though Dasher was honestly trying to recall the entire incident, he was obviously confused as to whether Maddy said that the Union claimed to represent the employers or whether Maddy said the Union did represent the employees. In addition he was very uncertain as to when the conversation occurred. Under these circumstances I do not believe that Dasher's testimony in this regard has probative weight.

f. *The unilateral change—facts and conclusion*

For several years the regular hours of employment at the Ft. Lauderdale yard were from 7 a.m. to 4:30 p.m. on weekdays and 7 a.m. to 12 noon on Saturdays. The number of hours worked per week varied from time to time depending on the workload but the usual workweek was as stated. On December 2 Respondent posted a notice on its bulletin board stating that the workday on December 2 would be 7 a.m. to 3:30 p.m. and that in December 3 and thereafter it would be 8 a.m. to 4:30 p.m. There was no mention of Saturday work. This was the first time such a notice had been posted. The new hours were thereafter observed. During the hearing the General Counsel amended the complaint to allege this change in hours as a violation of Section 8(a)(5) and (1) of the Act. The General Counsel made clear that he was not alleging that the change in hours was a discrimination because of union activity and he did not argue that the change had other than economic motivation. His theory simply was that a unilateral change was made at the time when Respondent had a duty to bargain with the Union. Respondent did not bargain with the Union about the change. I find that the change was a unilateral modification of existing working conditions and as I have already found that the Respondent had a duty to bargain with the Union, the change is an additional violation of Section 8(a)(5) and (1) of the Act. I will therefore recommend that the Respondent be ordered to cease and desist from making such unilateral changes. However, in the circumstances of this case where the underlying duty to bargain is being litigated, I do not believe that any additional remedy for the unilateral change would be warranted. Cf. *Donna Lee Sportswear*, 174 NLRB No. 54.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantnal relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the unit set forth above and, if an understanding is reached, embody such understanding in a signed agreement.[22]

Having found that Respondent discharged and failed to reinstate James F. Aldridge and Willie L. Jeter in violation of Section 8(a)(3) and (1) of the Act, I shall further recommend that Respondent offer reinstatement to said employees and make them whole for any loss of pay resulting from their discharge from the date of their discharge to the date on which they are offered reinstatement, less their net earnings during that period. Such backpay

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[22] In view of the Respondent's numerous and serious violations of Section 8(a)(1) and (3) of the Act, I would recommend a bargaining order as a remedy to those violations even if no violation of Section 8(a)(5) were found. *Irving Air Chute Company, Inc.*, 149 NLRB 627; *Frito-Lay*, 169 NLRB No. 115; *Heck's Inc.*, 172 NLRB No. 255.

shall be computed on a quarterly basis in a manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act:

> All employees employed by Respondent at its Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. At all times since August 2 the Union has been the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By refusing on August 6 and thereafter to bargain with the Union as the exclusive representative of the employees in the said appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discharging and refusing to reinstate James F. Aldridge and Willie L. Jeter because of their activity on behalf of the Union, thereby discouraging membership in the Union, Respondent has violated Section 8(a)(3) of the Act.

7. By the foregoing conduct and by interrogating its employees about their union activities, by threatening them with discharge if they engaged in such activity and by promising them benefits if they refrained from such activity, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by Section 7 of the Act and thereby has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that Respondent, Nat Harrison Associates, Inc., shall:

1. Cease and desist from:

(a) Interrogating its employees about their union activities.

(b) Threatening its employees with loss of jobs or economic benefits if they become members of or assist the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

(c) Promising its employees economic benefits if they refrain from becoming a member of or assisting that labor organization.

(d) Discriminating against its employees by discharging them in order to discourage membership in that labor organization.

(e) Refusing to recognize and bargain with the International Bortherhood of Electrical Workers, Local No. 728, AFL-CIO, as the exclusive representative of its employees in the following unit:

All employees employed by Nat Harrison Associates, Inc., at its Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(f) Unilaterally changing the terms and conditions of employment of its employees in said unit without bargaining with said labor organization as the exclusive representative of the employees in that unit.

(g) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to James F. Aldridge and Willie L. Jeter reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.

(b) Make whole the above-named employees for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to the amount he normally would have earned as wages from the date of the discharge to the date of the offer of reinstatement, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Upon request bargain collectively with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described above, and, if an

understanding is reached, embody such understanding in a signed agreement.

(e) Post at its Fort Lauderdale, Florida, yard, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[24]

Dated at Washington, D. C.

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[23] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" and in the first paragraph of the notice the words "a Trial Examiner of" shall be deleted. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[24] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice To All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a Trial at which all sides had the chance to give evidence, a Trial Examiner of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this Notice.

The Act gives all employees these rights:

To engage in self organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things

We Will Not do anything that interferes with these rights. More specifically,

We Will Not ask you whether you are a member of or are helping the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

We Will Not threaten you with loss of your job or any benefits you now enjoy if you become a member or help that Union.

We Will Not promise to reward you in any way if you refrain from becoming a member of or helping that Union.

We Will Not discharge any employee to discourage membership in that Union.

WE WILL immediately offer to reinstate James F. Aldridge and Willie L. Jeter to their former or substantially equivalent positions without any change in seniority or other privileges they enjoyed before we discharged them and we will pay to them any money they lost as a result of the discrimination against them with interest at 6 percent.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL recognize International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, as the only collective-bargaining representative of our employees in the bargaining unit which is:

> All employees employed by us at our Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL bargain on request with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, on wages, hours and conditions of employment and any agreement we reach will be put in writing and signed.

WE WILL NOT change your hours or other conditions of employment without bargaining with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

NAT HARRISON ASSOCIATES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, Ext. 227.